is found in the same judgment. Mr. Ross Munro said that he agreed with my decision in that judgment in this respect.

With regard to prayer 2(b)(ii), Mr. Ross Munro raised a new ground, that is the doctrine of merger. In prayer 2(b)(ii) Lorrain asks the Court to determine whether the plaintiffs can maintain the present action by reason of the matters set out in paragraphs 56, 58 and 59 of his statement of defence. Paragraph 58A(b) of Lorrain's statement defence states that BMF had sued and obtained judgment in Hong Kong against one of the debtors, CNL in Suit 1983 No. 15133 on July 17, 1984 for the recovery as a debt of the said US$38.5 million and US$1.5 million referred to in the statement of claim. In paragraph 59, Lorrain avers that the plaintiffs' causes of action in respect of the said US$38.5 million and US$1.5 million loans have merged in the Hong Kong judgment.

Mr. Ross-Munro submitted that the plaintiffs cannot obtain judgment against CNL in Hong Kong and at the same time sue Lorrain for judgment on the said sum because those two rights are inconsistent. These inconsistent rights merged into the judgment.

The question is what is the position of the law relating to merger? When a judgment has been given in an action, the cause of action in respect of which it was given is merged in the judgment and its place is taken by the rights created by the judgment, so that a second action may not be brought on that cause of action. There will be no merger unless the cause of action is the same in both actions: *Halsbury's* Laws of England, 4th Ed. v. 26, p. 274. In *Isaacs & Sons* v. *Salbstein and Another,*[21] Pickford L.J. said, "If the liability is joint, there is only one cause of action, and that becomes merged with the judgment; if the liability is several, there are two causes of action and there is no merger by reason of the judgment." In *Goldrei, Foucard and Son* v. *Sinclair,*[22] the English Court of Appeal held that the plaintiffs were entitled to recover, as there were two causes of action, one against the company for rescission of the agreement and the repayment of the £105, in respect of which fraud was not a necessary element, and the other against both defendants to recover damages for fraud; and that the judgment against the company and the claim for rescission was no bar to the claim against the first defendant for damages for fraud.

In the instant case, the cause of action in the Hong Kong suit was breach of contract. The cause of action against Lorrain in C438 is breach of fiduciary duty. These are two different causes of action. Furthermore the defendants are not the same in the two actions. In the Hong Kong suit the defendant was CNL. In C438 the defendants are Lorrain and three others. In the circumstances the doctrine of merger does not apply in the present case.

For the reasons stated above, I make the following orders:

(i) The applications to strike out the writs and statements of claim in C138 and C438 are dismissed.

(ii) The applications, for stay of proceedings in both civil suits on the ground that the Courts in Hong Kong being the forum of convenience, are dismissed.

(iii) With regard to prayer 2(a) in C438, the law applicable to the substantive matters in issue in these two proceedings is the law of Malaysia.

(iv) I make no order with regard to prayer 2(b)(i) in C438 as Mr. Ross-Munro agreed with my earlier judgment dated September 4, 1986 in respect of this point.

(v) With regard to prayer 2(b)(ii) in C438, the plaintiffs can maintain the present action. The doctrine of merger does not apply in C438.

(vi) Lorrain will pay the plaintiffs the costs of his two applications in C138 and C438.

Order accordingly.

Solicitors: *Skrine & Co.; James Foong & Anand.*

V. R. MENON v. THE GOVERNMENT OF MALAYSIA

[O.C.J. (Ajaib Singh J.) May 8, 1987]

[Kuala Lumpur – Civil Suit No. P 172 of 1984]

Constitutional Law – Pensions – Law restricting additional pension benefits to residents in Malaysia – Whether ultra vires and unconstitutional – Federal Constitution, arts. 4(1), 8(1) & 147 – Indian Constitution, art. 14 – Pensions Adjustment Act 1980, s. 1(2).

Pensions – Law restricting additional pension benefits to residents in Malaysia – Classification based on residence arbitrary and discriminatory – Whether ultra vires – Federal Constitution, arts. 4(1), 8(1) & 147 – Pensions Adjustment Act 1980, s. 1(2).

The plaintiff was an Indian citizen and lived in India. He joined the Electrical Department on June 16, 1941 and retired on February 1, 1973. He received increases in his pension as and when pensions were revised by the Government but when the Pensions Adjustment Act 1980 was passed giving more benefits to pensioners and to their dependants the plaintiff found himself precluded from receiving these additional benefits because the application of the Act was restricted to pensioners and their dependants who are resident in Malaysia.

The plaintiff sought a declaration that the provision in section 1(2) of the Pensions Adjustment Act 1980 which restricts the application of the Act to pensioners and their dependants who are resident in Malaysia is *ultra vires* and consequently he sought orders to the effect that his pension be adjusted in accordance with the Act.

Held, allowing the plaintiff's application: (1) the restrictive provision in section 1(2) of the Pensions Adjustment Act 1980 which deprives non-resident pensioners and their dependants from the benefits under the Act is unconstitutional;

(2) a reasonable classification does not offend article 8(1) of the Federal Constitution. But the classification must be founded on an intelligible differentia which distinguishes one class from another class of persons. And there must be a rational nexus between this differentia and the object sought to be achieved by the Act;

(3) there is nothing in the Act or in the Bill or anywhere in evidence to support the contention that the classification – the drawing of lines – separating resident pensioners from non-resident pensioners – is reasonable. Pensioners are homogenous – a class by themselves – and they cannot be divided and treated differently for the purpose of their pensions merely because of their place of abode. There must be some real difference on which the classification can be founded but such difference is lacking in this classification;

(4) the classification of residents and non-resident pensioners is not based on an intelligible differentia and that the differentia is wholly unrelated to the object of the Pensions Adjustment Act 1980. The classification offends Article 8(1) of the Federal Constitution and has to be declared void;

(5) the plaintiff's pension is to be adjusted in accordance with the provisions and arrears together with 8% interest per annum to be calculated on a yearly basis paid to him.

Cases referred to:

(1) *State of West Bengal* v. *Anwar Ali Sarkar* [1952] S.C.R. 284, 334; A.I.R. 1952 S.C. 75, 93.
(2) *Malaysian Bar & Anor.* v. *Government of Malaysia* [1987] 2 M.L.J. 165.
(3) *Datuk Haji Harun bin Haji Idris* v. *Public Prosecutor* [1977] 2 M.L.J. 155.

A CIVIL SUIT.

G. T. Rajan for the plaintiff.

P. M. Mahalingam (Senior Federal Counsel) for the defendants.

Cur. Adv. Vult.

Ajaib Singh J.: The plaintiff in this case seeks a declaration that the provision in section 1(2) of the Pensions Adjustment Act 1980 which restricts the application of the Act to pensioners and their dependants who are resident in Malaysia is *ultra vires* and consequently he seeks orders to the effect that his pension be adjusted in accordance with the Act.

The Pensions Adjustment Act 1980 came into force on July 1, 1980 whereby additional benefits were given to pensioners and to their dependants. The Act however states that its provisions would apply only to pensioners or their dependants who reside in Malaysia. Section 1(2) of the Act reads as follows –

"1(2) Subject to this section, this Act shall apply throughout Malaysia in respect of –

(a) officers who on retirement receive or are entitled to receive pensions or other benefits under any written law;
(b) the dependants of officers referred to in paragraph (a) who, on the death in service or in retirement of the officers concerned, receive or are entitled to receive pensions or other benefits under any written law;
(c) the dependants of officers referred to in paragraph (a) being dependants who, prior to the coming into force of this Act, were not entitled to receive pensions or other benefits under any written law; and
(d) the dependants of officers who had died or die in service under the old scheme where the officers had been or have been confirmed in their appointments and, in respect of pensionable officers, emplaced on the pensionable establishment in accordance with the written law or the terms and conditions of service applicable to their case, being dependants who, prior to the coming into force of this Act, were not entitled to receive pensions or other benefits under any written law;

who are resident in Malaysia."

The plaintiff is an Indian citizen and lives in India. He joined the Electrical Department now known as the National Electricity Board on June 16, 1941 and retired on February 1, 1973. He has received increases in his pension along the way as and when pensions were revised by the Government but when the 1980 Act was passed giving more benefits to pensioners and to their dependants the plaintiff found himself precluded from receiving these additional benefits because the applica-

tion of the Act was restricted to pensioners and their dependants who are resident in Malaysia.

After duly considering the evidence and the relevant law applicable in this case I have come to the conclusion that the restrictive provision in section 1(2) of the Pensions Adjustment Act 1980 which deprives non-resident pensioners and their dependants from the benefits under the Act is unconstitutional.

Article 4(1) of the Federal Constitution provides that the constitution is the supreme law of the country and that any law passed after August 31, 1957 which is inconsistent with the constitution shall be void to the extent of the inconsistency. The restrictive provision in the Pensions Adjustment Act offends Article 8(1) of the Constitution and it must be declared void pursuant to Article 4(1). Article 8(1) which states that all persons are equal before the law and entitled to the equal protection of the law extends to all persons whether they are Malaysian citizens or not and it is designed to prevent any person or class of persons from being segregated for differential treatment by discriminating legislation.

A reasonable classification however does not offend Article 8(1) of the Federal Constitution. But the classification must be founded on an intelligible differentia which distinguishes one class from another class of persons. And there must be a rational nexus between this differentia and the object sought to be achieved by the Act.

The judicial approach to the question of reasonable classification is more or less settled in India as well as in Malaysia. In the case of the *State of West Bengal* v. *Anwar Ali Sarkar*[1] Das J in dealing with this question of classification and with Article 14 of the Indian Constitution which is similar to Article 8(1) of the Federal Constitution said as follows –

"It is now well established that while Article 14 is designed to prevent a person or class of persons from being singled out from others similarly situated for the purpose of being specially subjected to discriminating and hostile legislation, it does not insist on an abstract symmetry in the sense that every piece of legislation must have universal application. All persons are not, by nature, attainment or circumstances, equal and the varying needs of different classes of persons often require separate treatment and, therefore, the protecting clause has been construed as a guarantee against discrimination amongst equals only and not as taking away from the State the power to classify persons for the purpose of legislation. This classification may be on different bases. It may be geographical or according to objects or occupations or the like. Mere classification, however, is not enough to get over the inhibition of the Article.

The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them.

In short, while the Article forbids class legislation in the sense of making improper discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liability proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense I have just explained."

In the case of the *Malaysian Bar & Anor.* v. *Government of Malaysia*[2] Mohamad Azmi S.C.J. has succinctly set out the correct approach to this question of classification – principles which he has gleaned from the earlier case of *Datuk Haji Harun bin Haji Idris* v. *Public Prosecutor*[3] – as follows –

"(a) The first question to be asked is, is the law discriminatory, and that the answer should then be – if the law is not discriminatory, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation, we have to ask the further question, is it allowed? If it is, the law is good, and if it is not the law is void.

(b) Discriminatory law is good law if it is based on reasonable" or "permissible" classification, provided that:

(i) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and

(ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

(c) In considering Article 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy."

Mr. P. M. Mahalingam for the government conceded that the restrictive provision in section 1(2) of the Pensions Adjustment Act 1980 is discrimi-

natory but submitted that it is not inconsistent with Article 8(1) of the Federal Constitution. He said that it is a reasonable classification in accordance with government policy that the Act should apply only to pensioners who are resident in Malaysia. The government policy he said is reflected in a letter dated August 25, 1980 addressed to the plaintiff by the Director General of the Public Services Department which reads as follows:

"Dear Sir,

I refer to your letter dated July 12, 1980 addressed to His Excellency Mr. Mon Jamaluddin, High Commissioner for Malaysia in India concerning the new pension scheme which was introduced recently.

2. As inflation in the country has reduced the real value of pensions, the Malaysian Government has from time to time supplemented the pensions by according increases in the form of allowances to its employees who had retired with pensions based on wages prevailing at the time of their retirement. The Government was not committed to pay such increases to pensioners resident outside Malaysia whose pensions were also affected by changes in the cost-of-living in the countries in which they were residing but nevertheless, it had in the past extended these increases as a matter of concession.

3. When the wages for employees in the public sector were revised effective from 1st July 1980, the Government decided that employees who had retired before the revision should receive pensions recomputed on the revised wages that they would have drawn had they been deemed to be in service when the revision took effect. Widows of pensioners and employees also became eligible to receive pensions for life on condition that they do not remarry. These were new principles and the Government, as a matter of policy, decided that it should not extend these principles to pensioners who reside outside Malaysia. It would also be unreasonable for local tax payer to bear the additional cost of such payments.

4. The Pensions Adjustment Bill, 1980 that was passed by Parliament in July makes provision for the implementation of the above principles to pensioners and their dependants who are residing in this country. The Government was fully cognizant of Article 8(1) of the Federal Constitution which guarantees equal protection of the law and did not consider that the restriction of the application of the Pensions Adjustment Bill to only Malaysian residents as discriminatory in relation to those who are residing outside Malaysia. The Pensions Adjustment Bill makes provision for adjustment of pensions granted under any written law. Since it applied to residents, the Pensions Adjustment Bill did not in any way alter the existing laws under which pensions have been granted and continue to be paid. The Pensions Ordinance, 1951 under which pensions had been granted to most of the Malaysian pensioners resident in India had not become less favourable than on the dates of their retirement.

5. The Government is appreciative of the service rendered by its employees in the past and considers not only legally but morally bound to honour its commitment. However, this commitment could not be stretched to confer privileges and benefits to non-resident pensioners that are not in the public interest. The Government has considered your representation and I regret to inform you that it is unable to extend the provisions of the Pensions Adjustment Bill to Malaysian pensioners not resident in Malaysia.

Yours faithfully,

Sgd
(AHMAD BADRI BIN MOHAMED BASIR)
Director of Pensions Division,
for Director General of Public Services."

With respect I cannot agree with Mr. Mahalingam's submission. The government policy and reasons given for the classification as set out in the letter from the Public Services Department do not afford any rational principle on which the impugned classification can be based. And the classification has no rational nexus whatsoever with the object sought to be achieved by the Pensions Adjustment Act 1980 which is to provide additional benefits to pensioners and to their dependants. There is nothing in the Act or in the Bill or anywhere in evidence to support the contention that the classification – the drawing of lines – separating resident pensioners from non-resident pensioners – is reasonable. There is no marked quality or characteristic which is to be found in resident pensioners and not found in non-resident pensioners. The residential criterion is certainly not a distinguishing mark for the purpose of implementing the policy and purpose of the Act which is to ameliorate the financial position of pensioners – all pensioners wherever they may be living. Pensioners are homogeneous – a class by themselves – and they cannot be divided and treated differently for the purpose of their pensions merely because of their place of abode. There must be some real difference on which the classification can be founded but such difference is lacking in this classification and the classification cannot therefore be sustained. The classification is clearly arbitrary and discriminatory and is against the fundamental right of a person to be equal before the law and entitled to the equal protection of the law.

Pension rights are vested rights and they are protected under Article 147 of the Federal Constitution which states that the law applicable to any pension, gratuity or other like allowance granted to a member of any of the public services or to his widow, children, dependant or personal representatives shall be that in force on the relevant date as prescribed in the Article or any later law not less favourable to the person to whom such pension, gratuity or other like allowance is granted. The later law is the Pensions Adjustment Act 1980.

Any later law passed with the avowed object of ameliorating the financial position of pensioners and their dependants cannot be withheld from any group of pensioners and their dependants just because they are non-resident. This later law – the Pensions Adjustment Act 1980 – is applicable to the pension of the plaintiff in this case. Any attempt to deprive him from the benefits of this law will amount to an arbitrary and unfair discrimination inconsistent with Article 8(1) and Article 147 of the Federal Constitution. Pensioners are a diminishing race. They have given the best years of their lives in the service of the country. And now in their twilight years we cannot deprive the pensioners who left the country of the additional benefits that we are giving to those who are resident in Malaysia. It is just not fair.

In the circumstances therefore I find that the classification of residents and non-resident pensioners is not based on an intelligible differentia and that the differentia is wholly unrelated to the object of the Pensions Adjustment Act 1980. The classification offends Article 8(1) of the Federal Constitution and has to be declared void. I accordingly declare that the provision in section 1(2) of the Pensions Adjustment Act 1980 which restricts the application of the Act to residents in Malaysia is void and of no effect. The plaintiff's claim is allowed with costs. His pension is to be adjusted in accordance with the provisions of the Pensions Adjustment Act 1980 and arrears together with 8% interest per annum to be calculated on a yearly basis paid to him. In exercising my discretion in allowing interest I took into consideration the fact that the plaintiff was kept away from his just dues despite his claim made to the Pensions Department by letter dated July 12, 1980 just over a month from the date when the Pensions Adjustment Act 1980 came into force.

Order accordingly.

Solicitors: *G. T. Rajan & Co.*

PONTIAN BAS BERHAD v. PUBLIC PROSECUTOR

[A.Cr. J. (L.C. Vohrah J.) July 25, 1987]

[Johor Bahru – Criminal Appeal No. 100 of 1985]

Employees Provident Fund – Employer failing to remit contribution to Employees Provident Fund Board – Charged in court and fined – Fine paid – Order against manager to pay arrears of contributions – Failure to pay – Committal order against manager – Whether committal order proper – Employees Provident Fund Act 1951, s.16A(1)(c) & (4).

Criminal Law and Procedure – Sentence of a fine – Fine paid – Arrears of contributions to Employee Provident Fund Board – Committal order against manager of employer for failure to pay – Arrears not imposed as a fine – Whether committal order should be set aside – Criminal Procedure Code (F.M.S. Cap. 6), s. 283(i)(b)(4) & (c).

Provident Fund – Arrears – Order against manager to pay arrears of contributions – Civil debt and not by way of penalty – Committal order set aside.

On October 15, 1984, the appellant-company was charged under section 16A(1)(c) of the Employees Provident Fund Act 1951 for failing as an employer to remit contributions in respect of certain employees. Its manager pleaded guilty to all the charges. The magistrate imposed fines in the total sum of $4,320 which was paid. The magistrate also ordered the appellant-company to pay to the Board arrears of contributions amounting to $28,325 by December 15, 1984. The manager failed to do so and eventually on October 18, 1986, the magistrate made the order committing him to 10 months' imprisonment for failing to pay the arrears. The appellant-company appealed. The question for decision is whether the manager can be imprisoned for his failure to pay the arrears of contributions owed to the Board by the appellant-company.

Held, allowing the appeal: (1) the specific provisions of section 283(i)(b)(4) and (c) of the Criminal Procedure Code prescribe imprisonment in case of default of payment of a fine imposed as punishment for a particular offence. These specific provisions cannot apply to arrears of contributions upon certification because they were not fines as such;

(2) the arrears of contribution by their very nature constitute a civil debt and were not ordered to be paid by way of a penalty. The order of committal made by the learned Magistrate should accordingly be set aside.

Case referred to:

(1) *Public Prosecutor* v. *Lai Sien Kon* [1978] 2 M.L.J. 110.

CRIMINAL APPEAL.

P. Nainan for the appellant.

Saufee Afandi bin Mohamad (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

L.C. Vohrah J.: This is an appeal against an order of the Magistrates' Court committing the manager of the appellant-company to a term of imprisonment for his failure to pay arrears of contributions owed by it to the Employees Provident Fund Board after undertaking to do so by a certain date.